Supreme Court, U.S.
FILED

No. 10-569 OCT 27 2010

OFFICE OF THE CLERK

In the

Supreme Court of the United States

JACK CONWAY, Named in his Official Capacity as Attorney General of the Commonwealth of Kentucky,
Petitioner,

v.

BART McQUEARY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JACK CONWAY
ATTORNEY GENERAL OF THE
COMMONWEALTH OF KENTUCKY
TAD THOMAS
Counsel of Record
ASSISTANT DEPUTY ATTORNEY GENERAL
700 CAPITAL AVE., SUITE 118
FRANKFORT, KY 40601
(502) 696-5300
Tad.Thomas@ag.ky.gov

Attorneys for Petitioner

October 27, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether success in gaining a preliminary injunction may warrant an award of counsel fees under 42 U.S.C.A. § 1988, where there has been no final decision on a claim for permanent injunctive relief.

LIST OF PARTIES

Petitioner is Jack Conway in his official capacity as the Attorney General for the Commonwealth of Kentucky.

The Respondent is Bart McQueary.

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinion Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved . 1

Statement of the Case 2

Reasons for Granting the Writ 8

Conclusion 10

Appendix

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit (July 29, 2007) 1a

Appendix B: Opinion and Order, United States District Court, Eastern District of Kentucky, Central Division at Frankfort (June 26, 2009) 26a

Appendix C: Judgment, United States District Court, Eastern District of Kentucky, Central Division at Frankfort (July 14, 2009) 52a

TABLE OF AUTHORITIES

Cases

Buckhannon v. West Virginia Dept. of Human Resources,
532 U.S. 598, 121 S.Ct. 1835 (2001) 8, 10

McQueary v. Stumbo,
453 F. Supp. 2d 975 (E.D. Ky. 2006) 6

Snyder v. Phelps,
petition for cert. filed (U.S. Dec. 23, 2009)
(No. 09-751) 2

Sole v. Wyner,
551 U.S. 74, 127 S.Ct. 2188 (2007) 9, 10

Statutes

28 U.S.C. § 1254 1

42 U.S.C.A. § 1988 7

42 U.S.C. § 1988(b) 1

KRS 525.055 ..... 3, 4

KRS 525.145 5

KRS 525.155 5

Rules

F.R.C.P. 12(c) 6

Other

Kentucky House Bill 333 and Kentucky Senate Bill 93 . . . . . *passim*

PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals which reversed the District Court's Opinion and Order.

OPINION BELOW

The Sixth Circuit's opinion is reported as 614 F.3d 591 (6th Cir. (Ky.), July 29, 2010) (NO. 09-5807). The District Court's Opinion and Order is reported as 634 F.Supp.2d 821 (E.D. Ky. 2009).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on July 29, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42, section 1988(b) of the United States Code provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in

its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

The Respondent, Bart McQueary, is a supporter of the Westboro Baptist Church of Topeka, Kansas, and its leader, the Rev. Fred Phelps. As this court is well aware from *Snyder v. Phelps*, 09-751, which is currently pending before the Court, this "church" travels the country protesting the funerals of military personnel, homosexuals and people who have died of AIDS. The messages of hate and intolerance conveyed by this group have been condemned by many.

In the 2006 session of the Kentucky General Assembly, two bills were passed that were intended to address the complaints and concerns of the family members of deceased soldiers who became unwitting victims of the Westboro Baptist Church's hate speech. Kentucky House Bill 333 and Senate Bill 93, (hereinafter referred to as "the Act") were signed into law by the Governor on March 27, 2006.

The challenged provisions of the Act provided for the following:

(1) A person is guilty of interference with a funeral when he or she at any time on any day:

. . .

(b) Congregates, pickets, patrols, demonstrates, or enters on that portion of a public right-of-way or private property that is within three hundred (300) feet of [a funeral, wake, memorial service, or burial or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial services, or burial is being conducted]; or

(c) Without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial:

1. Sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or

2. Distributes literature or any other item.

McQueary never challenged the remaining provisions of the Act which are currently still in effect. These provisions prevent certain disorderly and disruptive conduct at funerals and certain conduct interfering with a funeral.

KRS 525.055 provides that a person is guilty of disorderly conduct in the first degree when he or she:

(a) In a public place and with the intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof:

1. Engages in fighting or in violent, tumultuous, or threatening behavior;

2. Makes unreasonable noise; or

3. Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose; and

(b) Acts in a way described in paragraph (a) of this subsection within three hundred (300) feet of a:

1. Cemetery during a funeral or burial;

2. Funeral home during the viewing of a deceased person;

3. Funeral procession;

4. Funeral or memorial service; or

5. Building in which a funeral or memorial service is being conducted; and

(c) Acts in a way described in paragraph (a) of this subsection at any point in time between one (1) hour prior to the commencement of an event specified in paragraph (b) of this subsection and one (1) hour following its conclusion; and

(d) Knows that he or she is within three hundred (300) feet of an occasion described in paragraph (b) of this subsection.

KRS 525.145 provides that a person is guilty of disrupting meetings and processions in the first degree when:

> With intent to prevent or disrupt a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, he or she does any act tending to obstruct or interfere with it physically or makes any utterance, gesture, or display designed to outrage the sensibilities of the group attending the occasion.

KRS 525.155 provides that a person is guilty of interference with a funeral when:

> At any point in time between one (1) hour prior to the commencement of an event specified in this subsection and one (1) hour following its conclusion, he or she blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted.

On May 1, 2006, the Respondent filed suit challenging the newly enacted statutes. In the suit, McQueary argued the Act was an unconstitutional infringement on his free speech rights and requested a declaratory judgment, preliminary and permanent injunctions against the Act's enforcement. Then Attorney General, Greg Stumbo, answered and filed a counter-claim for declaratory judgment asserting that

the Act was constitutional. The Attorney General argued that the government had a legitimate state interest in limiting hate speech at a funeral, a somber and sacred event, and that the Act constituted a reasonable restriction on the Respondent's speech. In addition, the Attorney General filed a Motion for Judgment on the Pleadings pursuant to F.R.C.P. 12(c). McQueary filed responses to the Attorney General's motions and simultaneously filed a Motion for Preliminary Injunction.

On September 26, 2006, the district court entered an Opinion and Order that denied the Attorney General's motions and granted McQueary's Motion for Preliminary Injunction. The district court opined that the Act was both content-neutral and served a significant state interest. However, the court also held that, "The provisions at issue in this case burden substantially more speech than is necessary to prevent interferences with a funeral or to protect funeral attendees from unwanted, obtrusive communications that are otherwise impractical to avoid." *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 995 (E.D. Ky. 2006). In determining whether to grant the preliminary injunction the court applied the long-standing principle that any loss of First Amendment Freedoms for any length of time constitutes an irreparable injury. *Id.* at 997. Finally, the court held that McQueary "established a strong likelihood of success on the merits." *Id.* at 998.

After the district court issued its opinion, the Kentucky General Assembly, in its 2007 session, amended the Act to remove the enjoined provisions. Consequently, McQueary and the Attorney General, now Attorney General Conway, then agreed to brief

two issues. First, whether the case was moot as a result of the legislative action; and second, whether McQueary was entitled to an award of attorney fees as a "prevailing party" under § 1988.

On June 26, 2009, the district court issued an Opinion and Order agreeing with the Attorney General that the case was indeed moot and denied McQueary's request for attorney fees.[1] In denying the counsel fees the court opined that McQueary was not a "prevailing party" under § 1988 because the preliminary injunction did not alter the legal relationship between the parties. The injunction against enforcement of the challenged provisions, the court held, was of no benefit to McQueary because existing law that was not challenged in the suit would have still prevented McQueary from engaging in his desired speech near a funeral. The court also found that, because existing Kentucky law would have precluded the Respondent's conduct, he was not entitled to counsel fees under the special circumstances exception.

McQueary appealed this decision to the Sixth Circuit Court of Appeals arguing that the trial court erred in denying his request for attorney fees. The Sixth Circuit reversed and opined that, where a party was successful in obtaining a preliminary injunction, despite the lack of a permanent injunction or lack of ruling on the merits, said party could be entitled to attorney fees under Section 1988. Unlike the district court below, the Sixth Circuit found that McQueary

---

[1] On appeal, McQueary did not contest the district court's holding that the General Assembly's action rendered the case moot; thus, it is not at issue here.

indeed benefited from the preliminary injunction because he was prohibited from engaging in the speech outlined in his complaint until the injunction was entered. Finally, while the district court found that this case presented the type of "special circumstances" under which it could deny a request for counsel fees, the circuit court held that there were no such facts in the record and remanded for further proceedings.

REASONS FOR GRANTING THE WRIT

In *Buckhannon v. West Virginia Dept. of Human Resources*, 532 U.S. 598, 121 S.Ct. 1835 (2001), this Court abolished the "catalyst theory" as a method for awarding counsel fees to "prevailing parties." The Buckhannon Board and Care Home had been cited by the West Virginia Department of Human Services for violating provisions of the state code which required all residents to be capable of "self-preservation" in the event of a fire. The home was ordered to shut down.

Prior to closing its doors, the home filed suit in federal district court claiming the state law provisions the government sought to enforce violated the Fair Housing Amendments Act of 1988 and the Americans With Disabilities Act. The government agreed to stay any additional enforcement action until the district court case was resolved. Then in 1988, prior to any decisions on the merits, the state legislature removed the offensive provisions from the code. The district court then dismissed the case as moot since there was no indication that the legislature would repeal those amendments.

This court held that the "catalyst theory" contradicted the plain meaning of the fee-shifting

statutes. Absent a judicially sanctioned change in the relationship of the parties based on the merit, as opposed to the consent of the parties, prevailing party status cannot be obtained.

Later, in *Sole v. Wyner*, 551 U.S. 74, 127 S.Ct. 2188 (2007) this Court further refined the law in this area by holding that a party who obtains a preliminary injunction that is later dissolved, mooted or otherwise undone, cannot be granted prevailing party status. Wyner had sought to create nude, anti-war artwork on a public beach. After notifying the Florida Department of Environmental Protection she was informed that any display must comply with Florida's "bathing suit rule." Wyner filed suit claiming this was an unconstitutional infringement on her free speech rights and sought both preliminary and permanent injunctive relief. After obtaining the preliminary injunction she conducted her nude peace symbol display. Later however, when seeking a permanent injunction, Wyner was unsuccessful.

The facts of this case provide the Court an opportunity to address an issue that was left unresolved after *Sole v. Wyner*. This Court reserved ruling on the issue presented here when it stated in *Sole*, "We express no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Id.*

Here, McQueary filed suit and moved for a preliminary injunction claiming the Act was overly broad and unconstitutionally infringed upon his free speech rights. He obtained a preliminary injunction

that prohibited the Commonwealth from enforcing the objectionable language in the Act, but he did not challenge other portions of the Act that would have prevented the same conduct according to the district court.

Just as in *Buckhannon*, the Kentucky General Assembly voluntarily amended the Act to remove the enjoined language and the preliminary injunction was ultimately dissolved by virtue of the case being dismissed as moot. Admitted, unlike *Buckhannon* in ruling on the Motion for Preliminary Injunction, the district court held that the plaintiff had shown a substantial likelihood of prevailing on the merits.

Attorney General Conway requests this Court accept review to further address questions of prevailing party status in light of the Court's holding in *Buckhannon*. The Court was not directly presented with this issue in *Sole*, but now has the opportunity to give instruction to the Circuit Court and avoid any inconsistency in judgments.

CONCLUSION

For the foregoing reasons, Jack Conway, Attorney General for the Commonwealth of Kentucky, prays this Court to grant this Petition for Writ of Certiorari.

Respectfully Submitted,

JACK CONWAY
Attorney General of the
Commonwealth of Kentucky

TAD THOMAS
Counsel of Record
Assistant Deputy Attorney General
700 Capital Ave., Suite 118
Frankfort, KY 40601
(502) 696-5300
Tad.Thomas@ag.ky.gov

Attorneys for Petitioner